89-1096

Supreme Court, U.S.
FILED
JAN 10 1990
JOSEPH F. SPANIOL, JR.
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NO.

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

IN THE MATTER OF: H. ROGER LAWLER, ETC., *Debtor.*

H. ROGER LAWLER,
Petitioner,
vs

THEODORE A. PAULISSEN, et ux.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 1990

QUESTIONS PRESENTED

1. Whether a violation of the automatic stay by Respondents, as creditors, under federal bankruptcy law is void, not merely voidable, in light of the fundamental purpose underlying the automatic stay to protect the exclusive jurisdiction of the federal bankruptcy court over property of the estate so that it is not dismembered and so that the debtor, Petitioner, is given a breathing spell from creditor harassment and can reorganize or the estate's assets can be distributed among all creditors in accordance with federal bankruptcy law.

2. Whether a state statute of limitations bars the debtor's (Petitioner's) complaint to protect property in the exclusive jurisdiction of the bankruptcy court by virtue of the paramount federal bankruptcy law where Respondents, as creditors, violated the automatic stay in respect to the protected property and Respondents did not seek and were not granted relief by the bankruptcy court from the automatic stay.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	6
CONCLUSION	26
CERTIFICATE OF SERVICE	27
APPENDIX:	
Appendix A Judgment and Opinion of Fifth Circuit Court of Appeals - 8/21/89	A-1
Appendix B Order on Petition for Rehearing and Suggestion for Rehearing *En Banc* - 10/12/89	B-1
Appendix C Rules 401 and 601 (Bankruptcy Act) Rule 4001 (Bankruptcy Code) 11 U.S.C. sec. 362 (Bankruptcy Code)	C-1
Appendix D 11 U.S.C. sec. 29 (Section 11e - Bankruptcy Act)	D-1
Appendix E 11 U.S.C. secs. 542 and 549 (Bankruptcy Code)	E-1
Appendix F Texas Revised Civil Statutes Annotated arts. 5529 and 5510	F-1
Appendix G *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989)	G-1

TABLE OF AUTHORITIES

PAGE

Cases

Association of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446, 448 (3d Cir. 1982) 16

Berman v. Provencher, 614 F.2d 823, 825 (1st Cir. 1980) 22

Blanchette v. State of New York, 412 F. Supp. 219, 222 (S.D.N.Y. 1976) 7, 17

Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306 (11th Cir. 1982) 7

Brown v. Dellinger (In re Brown), 734 F.2d 119 (2d Cir. 1984) 7

Burnham v. Todd, 139 F.2d 338 (5th Cir. 1943) ... 21, 22

Caribbean Food Products, Inc. v. Banco Credito y Ahorro Ponceno, 575 F.2d 961 (1st Cir. 1978) 7

Claude Regis Vargo Enterprises v. Bacarisse, 578 S.W.2d 524 (Tex.Civ.App.-Houston [14th Dist.] 1979, writ ref'd n.r.e.) 24

Commerzanstalt v. Telewide Systems, Inc., 790 F.2d 206, 207 (2d Cir. 1986) 16

Doneghy v. Texas, 334 S.W.2d 506, 509 (Tex.Civ.App.-Amarillo 1960) 19

Dushane v. Beall, 161 U.S. 513 (1896) 23

First National Bank v. Chitwood, 1 B.R. 415 (Bankr. W.D. Va. 1979) 7

Great American Reserve Ins. Co. v. Strain, 377 P.2d 583, 587 (Okla. 1962) 13

H & H Beverage Distrib. v. Dept. of Revenue of Pennsylvania, 850 F.2d 165 (3d Cir. 1988) 7

Hammond v. Whittredge, 204 U.S. 538 (1907) 23

Herget v. Central National Bank & Trust Co., 324 U.S. 4 (1945) 22, 23

In re Advent Corp., 24 B.R. 612 (1st Cir. Bankr. 1982) 7

PAGE

Cases continued

In re Barksdale, 15 B.R. 731 (Bankr. W.D. Va. 1981) 7
In re Brooks, 79 B.R. 479 (9th Cir. Bankr. 1987) .. 15, 16
In re Clark, 69 B.R. 885, 888 (Bankr. E.D. Pa. 1987) 7
In re Davis, 74 B.R. 406 (Bankr. N.D. Ohio 1987) ... 7
In re Dennis, 14 B.R. 125, 127 (Bankr. E.D. Pa. 1981) 7
In re Eisenberg, 7 B.R. 683 (Bankr. E.D.N.Y. 1980) .. 7
In re Ellis, 66 B.R. 821 (N.D. Ill. 1986) 7
In re Endres, 12 B.R. 404 (Bankr. Wis. 1981) 7
In re Fuel Oil Supply and Terminaling, Inc., 30 B.R. 360 (Bankr. N.D. Tex. 1983) 15
In re Golden Plan of California, Inc., 39 B.R. 551 (Bankr. E.D. Cal. 1984) 7
In re Grosse, 68 B.R. 847, 850 (Bankr. E.D. Pa. 1987) 7
In re Grosso, 9 B.R. 815 (Bankr. N.D.N.Y. 1981) 7
In re Hillcrest Lumber Co., 187 F. Supp. 304 (E.D.N.Y. 1959) 22
In re Holland, 21 B.R. 681 (Bankr. N.D. Ind. 1982) .. 7
In re Ira Haupt & Co., 280 F. Supp. 336, 340 (S.D.N.Y. 1967), *aff'd*, 390 F.2d 251, 254 (2d Cir. 1968) 18
In re J & L Transport, Inc., 47 B.R. 51 (Bankr. W.D. Wis. 1985) 7
In re Johnson, 18 B.R. 755 (Bankr. S.D. Ohio 1982) .. 7
In re Louisiana Ship Management, Inc., 761 F.2d 1025 (5th Cir. 1985) 2, 7
In re Mangiove, 9 B.R. 34 (Bankr. E.D. Fla. 1980) ... 7
In re McLean Industries, Inc., 76 B.R. 291, 295 (Bankr. S.D.N.Y. 1987) 7

PAGE

Cases continued

In re Mellor, 31 B.R. 151, 155 (9th Cir. Bankr. 1983) 7, 15
In re Miller, 10 B.R. 778 (Bankr. D. Md. 1981) 7
In re Murphy, 22 B.R. 663 (Bankr. D. Colo. 1982) ... 7
In re Murray, 5 B.R. 732 (Bankr. D. Md. 1980) 7
In re Oliver, 38 B.R. 245 (Bankr. D. Minn. 1984) 12, 13, 15
In re Pickus, 8 B.R. 114 (Bankr. D. Conn. 1980) 7
In re Sapp, 91 B.R. 520 (Bankr. E.D. Mo. 1988) .. 15, 16
In re Scott, 24 B.R. 738 (Bankr. N.D. Ala. 1982) 7
In re Shamblin, 878 F.2d 324, 327 (9th Cir. 1989) ... 7, 15
In re Smith Corset Shops, Inc., 696 F.2d 971 (1st Cir. 1982) 7
In re Stringer, 847 F.2d 549, 551 (9th Cir. 1988) 7, 15
In re Wallingsford's Fruit House, 30 B.R. 654 (Bankr. D. Me. 1983) 7
In re Ward, 837 F.2d 124 (3d Cir. 1988) 7
In re Wariner, 16 B.R. 216 (Bankr. N.D. Tex. 1981) . 7, 15
In re Yancy, 23 B.R. 945 (Bankr. E.D. Mich. 1982) .. 7
In re Young, 14 B.R. 809 (Bankr. N.D. Ill. 1981) 7
International Shoe Co. v. Pinkus, 278 U.S. 261 (1929) 20
Kalb v. Feuerstein, 308 U.S. 433 (1940) ..2, 6, 7, 12, 14, 15
Lawler v. Lomas & Nettleton Financial Corporation, 50 B.R. 110, 116 (Bankr. N.D. Tex. 1985) 7, 17
Matthews v. Rosene (In re Matthews), 739 F.2d 249 (7th Cir. 1984) 7
Meyer v. Rowen, 181 F.2d 715 (10th Cir. 1950) 7
Morgan Guaranty Trust Co. of New York v. American Savings and Loan Ass'n., 804 F.2d 1487 (9th Cir. 1986) 7
Nicholas v. United States, 384 U.S. 678, 683 (1966) .. 19

PAGE

Cases continued

NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 1986) 7

Posner v. Tabone (In re Posner), 700 F.2d 1243 (9th Cir. 1983) 7

Potts v. Potts (In re Potts), 142 F.2d 883 (6th Cir. 1944) 7

Richard v. City of Chicago, 80 B.R. 451, 453 (N.D. Ill. 1987) 11, 17

Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurants, Inc.), 754 F.2d 811 (9th Cir. 1985) ... 7

Sikes v. Global Marine, Inc., 881 F.2d 176 (5th Cir. 1989) 6, 8, 9, 12, 15, 16

Slaughter v. Qualls, 162 S.W.2d 671, 674 (Tex. 1942) 13, 24

Smith v. First America Bank, N.A. (In re Smith), 876 F.2d 524 (6th Cir. 1989) 7

United States v. Coleman American Cos., Inc. (In re Coleman American Companies, Inc.), 26 B.R. 825 (Bankr. D. Kan. 1983) 7

United States v. Lewis, 475 F.2d 571, 574 (5th Cir. 1973) 8

Wagner v. New York, Ontario and Western Railway, 146 F. Supp. 926, 928-929 (M.D. Pa. 1956) 18

Wallen v. Texas, 667 S.W.2d 621, 623 (Tex. App. - Austin 1984, no writ) 7

Yazoo & Miss. R.R. Co. v. Brewer, 231 U.S. 245 (1913) 23

Zestee Foods, Inc. v. Phillips Foods Corp., 536 F.2d 334 (10th Cir. 1976) 7

United States Constitution

U.S. Const. art. I, sec. 8, cl. 18 19

PAGE

Federal Statutes, Rules and Resolutions

Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598) (Bankruptcy Code), as amended 2, 3
Bankruptcy Statute of 1867, sec. 2 23
Bankruptcy Statute of 1898 (Bankruptcy Act), as amended 2
11 U.S.C. sec. 29 - Bankruptcy Act
(Section 11e) 2, 6, 20, 21, 22, 23
(Section 11d) 23
11 U.S.C. sec. 60(a)(1) - Bankruptcy Act 22
11 U.S.C. sec. 148 - Bankruptcy Act 8
11 U.S.C. sec. 362 - Bankruptcy Code ... 2, 3, 8, 9, 10, 12
11 U.S.C. secs. 542(c) and 549 - Bankruptcy Code ... 2, 16
28 U.S.C. sec. 1254(1) 2
Rule of Bankruptcy Procedure 401 ..... 2, 3, 8
Rule of Bankruptcy Procedure 601 ..... 2, 3, 8, 9, 11, 12, 13, 15, 16, 19, 24
Rule of Bankruptcy Procedure 601(b) 19
Rule of Bankruptcy Procedure 601(c) 12
Rules of Bankruptcy Procedure 10-601, 11-44, 12-23, 13-401 3
Rule of Practice and Procedure 4001 2
H.R. No. 595, 95th Cong., 1st Sess. 340-2 (1977) 11

Texas Statutes

Tex. Rev. Civ. Stat. Ann. art. 5510, now Tex. Civ. Prac. & Rem. Code sec. 16.026 (Vernon 1986) 2, 6
Tex. Rev. Civ. Stat. Ann. art. 5529, now Tex. Civ. Prac. & Rem. Code sec. 16.051 (Vernon 1986) 2, 6

Other Authorities

9 Am. Jur. 2d *Bankruptcy* secs. 3, 4, and 1287 (1963 - volume relating to Act) 20
9 Am. Jur. 2d *Bankruptcy* sec. 11 (1963 - volume relating to Act) 20
9 Am. Jur. 2d *Bankruptcy* sec. 1163 (1963 - volume relating to Act) 21
2 *Collier on Bankruptcy* ¶ 362.11 (15th ed. 1988) 15
9 *Collier on Bankruptcy*, ¶ 11.12(2) (14th ed. 1977) .. 23
13 *Collier on Bankruptcy*, ¶ 601.01 (14th ed. 1975) . 10, 11
Uniform Commercial Code sec. 2-403 14

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner H. Roger Lawler ("Petitioner") respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in No. 88-1738 entered August 21, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was not published and appears in *Appendix A* herein.

JURISDICTION

On August 21, 1989, the Court of Appeals for the Fifth Circuit rendered its decision and entered a judgment in Case No. 88-1738 *(Appendix A)*. Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied by order entered October 12, 1989 *(Appendix B)*.

Jurisdiction is invoked under the provisions of 28 U.S.C. sec. 1254(1) for the reason that the Court of Appeals for the Fifth Circuit decision is in conflict with *Kalb v. Feuerstein*, 308 U.S. 433 (1940), *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025 (5th Cir. 1985), and a legion of decisions from eight other federal circuit courts of appeals and numerous district and bankruptcy courts.

STATUTORY PROVISIONS INVOLVED

The Bankruptcy Statute of 1898 (Bankruptcy Act), as amended; The Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598) (Bankruptcy Code), as amended; Rules of Bankruptcy Procedure 401 and 601 (prescribed by this Court on April 24, 1973) (now Rule of Practice and Procedure 4001 prescribed by this Court on April 25, 1983 and 11 U.S.C. sec. 362) *(Appendix C)*; 11 U.S.C. sec. 29 (Section 11e) under the Bankruptcy Act *(Appendix D)*; 11 U.S.C. secs. 542(c) and 549 under the Bankruptcy Code *(Appendix E)*; Texas Revised Civil Statutes Annotated art. 5510, now Texas Civil Practice & Remedies Code sec. 16.026 (Vernon 1986), and Texas Revised Civil Statutes Annotated art. 5529, now Texas Civil Practice & Remedies Code sec. 16.051 (Vernon 1986) *(Appendix F)*.

STATEMENT OF THE CASE

The Court of Appeals affirmed the District Court's order affirming a summary judgment entered by the Bankruptcy Court involving the automatic stay in a case governed by

The Bankruptcy Statute of 1898 (the "Act"). The present form of the automatic stay in The Bankruptcy Reform Act of 1978 (the "Code") Section 362 made its appearance in the former Rules of Bankruptcy Procedure 401, 601, 10-601, 11-44, 12-23 and 13-401 under the Act.

Petitioner's bankruptcy was commenced under the Act by the filing of an involuntary petition on January 9, 1976. (Record Excerpts ("R.E.") 127 — Order Granting Motion for Summary Judgment, p. 1, ¶ 1). The Court of Appeals opinion, page 4, in error states that Petitioner was a debtor-in-possession; he was simply a debtor, there being a bankruptcy trustee who was appointed and not discharged until 1985.

Petitioner's bankruptcy was very large and involved numerous complex questions. In 1978, Petitioner consented to adjudication and various of Petitioner's entities were consolidated in the proceeding, making it one of the largest personal bankruptcies in the Northern District of Texas at the time. Petitioner's consent to adjudication and the consolidation of the other entities as his alter ego occurred after extensive litigation before the Bankruptcy Court. (R.E. 127 — Order Granting Motion for Summary Judgment, p. 1, ¶ 2). The case was converted to a Chapter XI on June 19, 1979, but the proposed Plan could not be confirmed until resolution of protracted litigation over a $16 million IRS claim before the Bankruptcy Court. The extensive litigation involving adjudication and alter ego, the $16 million claim by the IRS, the conversion of the case to a Chapter XI on June 19, 1979, and the filing of a Plan consumed the Bankruptcy Court, Petitioner, and the bankruptcy trustee's time from 1976 to early 1981. The IRS claim was concluded in 1984, and the Plan was confirmed paying creditors 100 percent of their principal and interest post-petition. (R. 335).

Prior to the bankruptcy, Mr. and Mrs. Paulissen ("Respondents") sold to Petitioner property located in Collin County, Texas taking a note from Petitioner as part of the purchase price; the note was secured by a deed of trust lien on the property. (R.E. 127 — Order Granting Motion for Summary Judgment, p. 1, ¶ 3). After filing of the bankruptcy, a notice of pending bankruptcy, i.e., *lis pendens,* was filed in Collin County. (R.E. 23 — footnote 1). Thereafter, on May 3, 1977, Respondents attempted to foreclose on Petitioner's property. (R.E. 128 — Order Granting Motion for Summary Judgment, p. 2, ¶ 4). Respondents attempted to reacquire title in satisfaction of the debt by taking a deed to the property while the automatic stay was in effect in Petitioner's proceeding and the property was in the exclusive jurisdiction of the Bankruptcy Court. Respondents did not move the Bankruptcy Court to lift, terminate, annul, or otherwise modify the automatic stay.

As required, Petitioner gave the bankruptcy trustee a reasonable opportunity to take action on Respondents' attempted wrongful foreclosure. Respondents entered an appearance on Petitioner's application filed on May 22, 1981 to cause the bankruptcy trustee to make a decision and to give Petitioner authority to employ counsel if the bankruptcy trustee declined to proceed against Respondents. (R.E. 96 — 7/30/81 hearing, p. 7. l. 8-9 — R. 359). In 1981, Bankruptcy Judge Gandy addressed the merits of Petitioner's case against Respondents and noted that any statute of limitations as to Respondents' wrongful foreclosure had been tolled:

> THE COURT: I certainly concede that's a far better case than I originally thought it was. If there was foreclosure on the debtor while an involuntary is pending

> without the stay being lifted and with the tolling statutes that exist in regards to the statutes of limitation, why it could very well be a cause of action that the estate ought to bring.

(R.E. 106-107 — 7/30/81 hearing, p. 17, l. 23 to p. 18, 1.4 — R. 369-370).

Judge Gandy stated that the delay resulted only from the Bankruptcy Court's "foot dragging" on the tax issue and its own "dilatory way" since it did not want to approve legal fees for Petitioner to proceed with the improper foreclosure action against Respondents until the tax issue was concluded. (R.E. 95-96 — 7/30/81 hearing, p. 6, l. 3 to p. 7, l. 2 — R. 358-359).

Thereafter, the bankruptcy estate was determined to be solvent even with the IRS claim, so in the Bankruptcy Court, Petitioner filed a complaint alleging that the attempted foreclosure sale and purchase by Respondents of Petitioner's property in the *custodia legis* of the Bankruptcy Court was void since Respondents violated the automatic stay. (R.E. 38-42 — Original Complaint; R.E. 128 — Order Granting Motion for Summary Judgment, p. 2, ¶ 6). The Bankruptcy Court approved the payment of Petitioner's attorneys' fees for filing the complaint, and the confirmed Plan continued Petitioner's authority to prosecute the action for the estate. Respondents answered alleging that a Texas statute of limitations barred Petitioner's complaint. Respondents' motion for summary judgment on the sole ground of the Texas statute of limitations was granted in 1987 by Bankruptcy Judge Akard and affirmed by the Court of Appeals.

On August 21, 1989, a panel of the Court of Appeals in its opinion for the first time concluded that violations of the automatic stay are voidable, not void. The Court of Appeals

opinion of August 21, 1989 cited as authority an opinion rendered four days *later* on August 25, 1989 by another panel of the Court of Appeals. *Sikes v. Global Marine Inc.*, 881 F.2d 176 (5th Cir. 1989) (Johnson, J., dissenting) (*"Sikes"*) (*Appendix G*). In *Sikes*, Judge Johnson strongly dissented based on the fundamental public importance of the automatic stay. *Sikes* was decided under the automatic stay provisions of the Bankruptcy Code.

In the instant case, the Court of Appeals concluded that Section 11e under the Bankruptcy Act (formerly at 11 U.S.C. sec. 29) required the application of the four-year Texas statute of limitations (Texas Revised Civil Statutes Annotated art. 5510, now Texas Civil Practice & Remedies Code sec. 16.026), not the ten-year Texas statute of limitations (Texas Revised Civil Statutes Annotated art. 5529, now Texas Civil Practice & Remedies Code sec. 16.051), since the four-year statute applied to voidable transactions and the ten-year statute applied to void transactions. Essential to the decision was the Court of Appeals' conclusion that the transaction at issue was merely voidable, not void, since it involved a violation of the automatic stay under federal bankruptcy law.

ARGUMENT

This Court in *Kalb v. Feuerstein*, 308 U.S. 433 (1940) (*"Kalb"*), established this axiom of bankruptcy law: actions taken against a debtor, without the prior consent of the bankruptcy court, are actions taken "without authority of law" and void. 308 U.S. at 443. The opinion of the Court of Appeals disregarded the legion of courts which have reaffirmed the *Kalb* axiom that acts in violation of the stay are void, including eight of the other circuit courts of appeal and

a prior Fifth Circuit Court of Appeals decision.[1] The panel of the Court of Appeals should not have overruled its prior

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[1]*Kalb v. Feuerstein*, 308 U.S. 433 (1940); *Caribbean Food Products Inc. v. Banco Credito y Ahorro Ponceno*, 575 F.2d 961 (1st Cir. 1978); *In re Smith Corset Shops, Inc.*, 696 F.2d 971 (1st Cir. 1982); *In re Advent Corp.*, 24 B.R. 612 (1st Cir. Bankr. 1982); *Brown v. Dellinger (In re Brown)*, 734 F.2d 119 (2d Cir. 1984); *H & H Beverage Distrib. v. Dept. of Revenue of Pennsylvania*, 850 F.2d 165 (3d Cir. 1988); *In re Ward*, 837 F.2d 124 (3d Cir. 1988); *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025 (5th Cir. 1985); *Potts v. Potts (In re Potts)*, 142 F.2d 883 (6th Cir. 1944); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986); *Smith v. First America Bank N.A. (In re Smith)*, 876 F.2d 524(6th Cir. 1989); *Matthews v. Rosene (In re Matthews)*, 739 F.2d 249 (7th Cir. 1984); *Posner v. Tabone (In re Posner)*, 700 F.2d 1243 (9th Cir. 1983); *In re Mellor*, 31 B.R. 151 (9th Cir. 1983); *Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurants Inc.)*, 754 F.2d 811 (9th Cir. 1985); *Morgan Guaranty Trust Co. of New York v. American Savings and Loan Ass'n.*, 804 F.2d 1487 (9th Cir. 1986); *In re Stringer*, 847 F.2d 549 (9th Cir. 1988); *In Re Shamblin*, 878 F.2d 324 (9th Cir. 1989); *Meyer v. Rowen*, 181 F.2d 715 (10th Cir. 1950); *Zestee Foods, Inc. v. Phillips Foods Corp.*, 536 F.2d 334 (10th Cir. 1976); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982); *Blanchette v. State of New York*, 412 F.Supp. 219 (S.D.N.Y. 1976); *Wallen v. Texas*, 667 S.W.2d 621, 623 (Tex. App. - Austin 1984, no writ); *In re Wariner*, 16 B.R. 216 (Bankr. N.D. Tex. 1981); *First National Bank v. Chitwood*, 1 B.R. 415 (Bankr. W.D.Va. 1979); *Lawler v. Lomas & Nettleton Financial Corporation*, 50 B.R. 110, 116 (Bankr. N.D. Tex. 1985); *In re Dennis*, 14 B.R. 125, 127 (Bankr. E.D. Pa. 1981); *In re Grosse*, 68 B.R. 847, 850 (Bankr. E.D. Pa. 1987); *In re Pickus*, 8 B.R. 114 (Bankr. D. Conn. 1980); *In re Eisenberg*, 7 B.R. 683 (Bankr. E.D.N.Y. 1980); *In re Ellis*, 66 B.R. 821, 823 (N.D. Ill. 1986); *In re Mangiove*, 9 B.R. 34 (Bankr. S.D. Fla. 1980); *In re Murray*, 5 B.R. 732 (Bankr. D. Md. 1980); *In re Barksdale*, 15 B.R. 731 (Bankr. W.D. Va. 1981); *In re Endres*, 12 B.R. 404 (Bankr. E.D. Wis. 1981); *In re Clark*, 69 B.R. 885, 888 (Bankr. E.D. Pa. 1987); *In re Miller*, 10 B.R. 778 (Bankr. D. Md. 1981); *In re Davis*, 74 B.R. 406 (Bankr. N.D. Ohio 1987); *In re Grosso*, 9 B.R. 815 (Bankr. N.D.N.Y. 1981); *In re Young*, 14 B.R. 809 (Bankr. N.D. Ill. 1981); *In re McLean Industries Inc.*, 76 B.R. 291, 295 (Bankr. S.D.N.Y. 1987); *In re Scott*, 24 B.R. 738 (Bankr. N.D. Ala. 1982); *In re Murphy*, 22 B.R. 663 (Bankr. D. Colo. 1982); *In re Yancy*, 23 B.R. 945 (Bankr. E.D. Mich. 1982); *United States v. Coleman American Cos. Inc. (In re Coleman American Companies, Inc.)*, 26 B.R. 825 (Bankr. D. Kan. 1983); *In re Holland*, 21 B.R. 681 (Bankr. N.D. Ind. 1982); *In re Johnson*, 18 B.R. 755 (Bankr. S.D. Ohio 1982); *In re Wallingsford's Fruit House*, 30 B.R. 654 (Bankr. D. Me. 1983); *In re Golden Plan of California, Inc.*, 39 B.R. 551 (Bankr. E.D. Cal. 1984); *In re J & L Transport, Inc.*, 47 B.R. 51 (Bankr. W.D. Wis. 1985).

decision without *en banc* consideration. *United States v. Lewis*, 475 F.2d 571, 574 (5th Cir. 1972).

The Court of Appeals opinion is of particular concern. It undermines fifty years of established law supporting the present certainty which attends the automatic stay. It treats the automatic stay as if it did not exist to begin with which creates risk and uncertainty in the administration of bankruptcy estates. It approves a creditor's unilateral dismemberment of a bankruptcy estate by removing property from the exclusive jurisdiction of the bankruptcy court without obtaining an order of the bankruptcy court, i.e., "without authority of law," and "in violation of the controlling Act of Congress." This undermines the fundamental operation of the bankruptcy system that rests on the bankruptcy court's exclusive jurisdiction over the property of the estate in its custody that is protected from disturbance by the automatic stay and places the burden on debtors to obtain judicial relief to undo violative acts.

Judge Johnson's dissent in *Sikes* is correct that the majority's conclusion "contravenes the fundamental purpose underlying the automatic stay in bankruptcy." If not overturned, the decision that violations of the automatic stay are voidable, not void, will encourage creditors to violate the automatic stay and later seek retroactive sanction for the violative act. This will destroy the automatic stay's protection of the predictable and orderly administration of property in the exclusive jurisdiction and custody of the bankruptcy court.

The present form of the automatic stay, now Bankruptcy Code Section 362, made its appearance in the Act Rules of Bankruptcy Procedure, Rules 401 and 601, as prescribed by this Court on April 24, 1973 (with the exception of an automatic stay provided in Section 148 of the former

Bankruptcy Act). Comment to Bankruptcy Code Section 362. Any slight difference between the Act and Code automatic stay would not mean a different result. This case involves the Act and *Sikes* involved the Code; in both cases, the Court of Appeals reached the same result. Hence, the fact that this is an Act case does not render it unworthy of consideration. Indeed, this case is important since it undermines the automatic stay under the Act which is the foundation for the same automatic stay under the Code.

The Advisory Committee's Note to Bankruptcy Rule 601 leaves no question as to the fundamental importance of the automatic stay's protection of the bankruptcy court's exclusive jurisdiction to deal with property in its possession from the date of bankruptcy and the requirement that the bankruptcy court's jurisdiction not be disturbed without its consent.

> The premise of the rule is that such a stay is no less needful in straight bankruptcy than in a reorganization case to protect creditors against prejudicial dismemberment and disposition of the estate before a trustee or receiver can qualify. The stay provided by this rule is to be distinguished from that provided by Rule 401, which reinforces §§ 11a, 14f(2), and 17c(4) of the Act by protecting the bankrupt against harassment and possible frustration of his right to a discharge.
>
> The first branch of subdivision (a) protects the custody of the bankruptcy court against interference by an attempt to enforce a lien, whether the attempt is by a judicial proceeding or by a nonjudicial mode of enforcement. Property is in the custody of the bankruptcy court if it is in the actual or constructive possession of the bankrupt at the date of bankruptcy. See *Ex parte Baldwin*, 291 U.S. 610, 615 (1934); *Chicago*

> *Board of Trade v. Johnson,* 264 U.S. 1, 12 (1924); *Lazarus, Michel & Lazarus v. Prentice,* 234 U.S. 263, 266-67 (1914); *Acme Harvester Co. v. Beekman Lbr. Co.,* 22 U.S. 300, 307 (1911); 1 Collier ¶ 2.62 [1] (1968); MacLachlan, *Bankruptcy* 205 (1956); Mussman & Riesenfeld, *Jurisdiction in Bankruptcy*, 13 Law & Contemp. Prob. 88, 92, 98 (1948). Insofar as such property is concerned, the rule is a substantially restricted restatement of the much quoted and applied dictum of *Mueller v. Nugent,* 184 U.S. 1, 14 (1901), that "the petition is a caveat to all the world, and in effect an attachment and injunction." Once the jurisdiction of the court has attached, any act or proceeding brought in another court to enforce a lien against such property cannot disturb the custody of the bankruptcy court without its consent. See *Isaac v. Hobbs Tie & Timber Co.,* 282 U.S. 734, 737 (1931). The automatic stay is thus a logical corollary of the bankruptcy court's exclusive jurisdiction to deal with the property of the bankrupt within its custody from the date of bankruptcy.

13 *Collier on Bankruptcy,* ¶ 601.01 (14th ed. 1975).

The Advisory Committee's Note, citing this Court's precedents, confirms that fundamental to the operation of the bankruptcy law is the exclusive jurisdiction of the bankruptcy court over property in its custody against dismemberment of the estate and the protection of all creditors. This protection is even more fundamental than the fundamental protection afforded the debtor by the stay:

> § *362. Automatic stay*
>
> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It *stops* all collection efforts, all harassment, and *all foreclosure actions.* It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy. (Our emphasis).

H.R. No. 595, 95th Cong., 1st Sess. 340-2 (1977); *Richard v. City of Chicago,* 80 B.R. 451, 453 (N.D. Ill. 1987).

The conclusion that a violation of the stay is not void but merely voidable is contrary to Bankruptcy Rule 601. Rule 601 resolved the conflict in favor of an interpretation that a violation of the stay is void, not merely voidable:

> *Subdivisions (b), (c), and (d).* Whether the enforcement of a lien against property in the bankruptcy court's custody by an act or proceeding after bankruptcy without permission of the bankruptcy court *is void* has been the subject of conflicting views by the courts and commentators . . . *This rule consists with the view that such an act or proceeding is void, but subdivision (c) recognizes that in appropriate cases the court may annul the stay so as to validate action taken during the pendency of the stay.* (Our emphasis).

13 *Collier on Bankruptcy,* ¶ 601.01 (14th ed. 1975).

The creditor must obtain the bankruptcy court's order removing the prohibition of the stay and without it, the creditor's action is void. A creditor is without the unilateral power to remove the property from the protective cocoon of the bankruptcy court's exclusive jurisdiction. However, the conclusion that a violative act is merely voidable means that somehow a creditor can unilaterally waive the automatic stay and remove property from the exclusive jurisdiction of the bankruptcy court, all without the bankruptcy court's permission.

The Court of Appeals opinion that a violation of the stay is merely voidable turns on a hypertechnical interpretation of one word, "annul." Because bankruptcy courts have the power to annul the stay (a power they did not possess in

1940 when this Court rendered its opinion in *Kalb*), the Court of Appeals in *Sikes* suggested that *Kalb* has been legislatively overruled. Such an interpretation resurrects the very conflict that Rule 601 was intended to bury.

In the face of the Advisory Committee's Note to Bankruptcy Rule 601, is it conceivable that the carry-over of the word "annul" from Rule 601 to Section 362 legislatively overruled *Kalb* so that a violation of the stay is merely voidable, not void? The word "annul" appeared in Rule 601(c) when the Advisory Committee's Note was written, stating, "This rule consists with the view that such an act . . . is *void*." This Court entered its order on April 24, 1973 approving Rule of Bankruptcy Procedure 601 in accordance with the Advisory Committee's Note, thus recognizing the efficacy of the *Kalb* axiom some thirty-three years later.

To "annul" the stay requires court action by the creditor, not the debtor. A creditor who believes that there is an extraordinary circumstance justifying annulment of the stay must request that extraordinary relief and obtain the bankruptcy court's order. In the words of the Advisory Committee's Note, "*the court* may annul the stay so as to validate action taken during the pendency of the stay." Without a court order, the violative act remains void.

"To validate" means to breathe life into that which is "invalid." A judicial act is indispensable to annul the stay; it cannot be done by the unilateral act of a mere creditor. To have permitted a creditor to do so by unilateral act, as in the instant case, is a dangerous precedent indeed.

The error in the Court of Appeals opinion can be illustrated by a discussion of *In re Oliver*, 38 B. R. 245 (Bankr. D. *Minn.*, 1984) (*"Oliver"*). *Oliver* was relied on in the *Sikes*

opinion. *Oliver* at 248 states that the court will "void" acts which violate the automatic stay. To say that the court will "void" a violative act means that the violative act is "valid" until "invalidated" by court order so that the stay would be treated as if it did not exist in the first instance. The Advisory Committee's Note to Rule 601 states the opposite: that the violative act is "void" until it is "validated" by court order, not the other way around.

The Court of Appeals holding that actions taken in violation of the stay are "voidable" has ramifications far more serious than the Court of Appeals apparently realized. The law recognizes, "[t]hat which is voidable operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared." *Slaughter v. Qualls,* 162 S.W.2d 671, 674 (Tex. 1942). A voidable act places on the party entitled to avoid the transaction an affirmative duty to act to obtain a judicial determination of voidness, *Great American Reserve Ins. Co. v. Strain,* 377 P.2d 583, 587 (Okla. 1962), giving the presumption of legitimacy to the transaction and placing the burden of proving otherwise on the debtor. Fearing the possible legitimacy of the creditor's violative action, the debtor must then seek affirmative relief in the bankruptcy court to obtain a ruling that the action was void. This procedure creates the very pressure and expense that the automatic stay was designed to prevent.

Treating actions taken in violation of the stay as voidable causes very profound practical problems. For example, if a creditor induces a court to issue a judgment in violation of the stay and the action is treated as voidable, it can be attacked only on direct appeal; a void court order, by contrast, is always subject to collateral attack. Under Section

2-403 of the Uniform Commercial Code, one who acquires voidable title has the power to transfer good title to a good faith purchaser for value, which could deprive a debtor of any interest in goods if a creditor acquires voidable title by violating the stay.

Under the decision, the creditors who chose to violate the law by violating the automatic stay as if the stay did not exist were treated more favorably than a creditor who abided by the law and honored the automatic stay.

The seriousness of treating the stay as if it did not exist to begin with should be evident.

> Violation of a Section 362 stay is a serious matter which should not be disregarded, let alone approved, without compelling reason. Any breach in this concept will only create precedent for further breaches. Eventually, a situation will come about, as a result of incremental rulings, where any creditor may contend that there is sufficient precedent so as to have warranted litigating in another court despite the stay. The creditor may thus proceed calculating that subsequent litigation in bankruptcy court could effect not only lifting of the stay but also remission of and retroactive sanction for violation of the Section 362 stay. Ingenious counsel can always extrapolate from precedent to a particular matter. It is therefore a reasonable prospect, given this case, that considerable such precedent may develop, thereby attenuating the present certainty which attends the Section 362 stay.

As to existing precedent, the action of appellee is void. E.g., *Kalb v. Feuerstein,* 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940); *Borg-Warner Acceptance Corp. v. Hall,* 685 F.2d 1306, 1308 (11th Cir. 1982) ("Actions taken in violation of the automatic stay are void and without effect"). See also 2 Collier (15th Ed.) Section

> 362.11; Kennedy, *The Automatic Stay in Bankruptcy*, 11 Journal of Law Reform 177 (1978) . . . .

In re Mellor, 31 B.R. 151, 155 (9th Cir. Bankr. 1983) (Volinn, J., dissenting).

The Court of Appeals opinion in the instant case is contrary to the great weight of authority and relies on *Sikes*. In turn, *Sikes* relies on the four out-of-step cases of *In re Fuel Oil Supply and Terminaling, Inc.*, 30 B.R. 360 (Bankr. N.D. Tex. 1983) ("*Fuel Oil*"); *In re Brooks*, 79 B.R. 479 (9th Cir. Bankr. 1987) ("*Brooks*"); *In re Sapp*, 91 B.R. 520 (Bankr. E.D. Mo. 1988) ("*Sapp*"); and *Oliver*. These four decisions hold that violations of the automatic stay are merely voidable, not void, which is contrary to the purpose of Bankruptcy Rule 601 to resolve the conflict in favor of void, not merely voidable. 2 *Collier on Bankruptcy* ¶ 362.11 (15th ed. 1988). The following is a brief discussion of these four cases.

After *Brooks*, the Ninth Circuit has held twice that violations of the automatic stay are void, citing *Kalb. In Re Shamblin*, 878 F.2d 324, 327 (9th Cir. 1989); *In re Stringer*, 847 F.2d 549, 551 (9th Cir. 1988). In *In re Stringer*, the Ninth Circuit recognized that there are "several narrow exemptions" to the automatic stay, leaving non-exempt acts as void, not merely voidable.

Brooks and *Oliver* relied on *Fuel Oil*. Bankruptcy Judge Flowers decided *Fuel Oil*. However, Judge Flowers in another case held that actions in violation of the stay are void *ab initio* whether the creditor acts with knowledge of the stay or not. *In re Wariner*, 16 B.R. 216 (Bankr. N.D. Tex. 1981). *Fuel Oil* and *Oliver* incorrectly limit the purpose of the stay to simply debtor protection and hold in effect

that the debtor can waive the stay. As previously pointed out, the Rule 601 stay protects not only the debtor, but even more fundamentally it protects property in the bankruptcy court's jurisdiction and the creditors. The debtor cannot unilaterally waive the automatic stay; an order of the bankruptcy court is required. *Commerzanstalt v. Telewide Systems, Inc.*, 790 F.2d 206, 207 (2d Cir. 1986); *Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir. 1982).

And, *Sapp* (citing *Brooks*) starts from a false premise by incorrectly stating, "Although there is some disagreement among the courts, it is generally accepted that actions taken in violation of the automatic stay are not void but voidable," contrary to the weight of authority and the express resolution of the conflict by Rule 601 that a stay violation is "void."

Thus, the four decisions relied on by *Sikes* are not sound authority.

Next, *Sikes* is factually distinguishable from the instant case. *Sikes* involved an interpretation of the intent of bankruptcy court orders entered after Mr. and Mrs. Sikes promptly sought relief from the automatic stay. In this case, Respondents never sought relief from the automatic stay, so there was no order affecting the stay to interpret.

The Court of Appeals opinion in *Sikes* also mistakenly cites 11 U.S.C. secs. 542(c) and 549 as authority that "the Bankruptcy Code specifically protects certain actions taken in violation of the stay." 881 F.2d at 179. Section 542(c) merely protects a transferor, acting without knowledge of the stay, from liability; it does not validate the transfer. Section 549 protects transferees acting without knowledge of the bankruptcy, as well as empowers the trustee to bring

actions against recalcitrant transferees that will not return property to the estate. The Court of Appeals misconstrues the applicability of these sections to the voidness issue, failing to recognize them as at most narrow, statutorily-defined exemptions. *See Richard v. City of Chicago*, 80 B.R. at 454.

Turning to Petitioner's Chapter XI, Bankruptcy Judge Ford in the Chapter XI, in *Lawler v. Lomas & Nettleton Financial Corporation*, 50 B.R. 110, 116 (Bankr. N.D. Tex. 1985), stated in respect to attempted foreclosures in violation of the automatic stay:

> . . . of course, the foreclosures would have been in violation of the automatic stay, and therefore void *ab initio*, and an action to try title would thus lie, Defendants and their assigns being naught but mere trespassers.

Respondents are mere trespassers if their foreclosure in violation of the automatic stay is void *ab initio*.

Respondents "acquired no title or other interest" in Petitioner's properties in the face of the automatic stay enjoining all persons from seizing or in any manner converting the properties of the debtor, Petitioner. *Blanchette v. State of New York*, 412 F. Supp. 219, 222 (S.D.N.Y. 1976). The property was within the custody of the Bankruptcy Court and Respondents' unilateral act, without an order of the Bankruptcy Court modifying the stay, was ineffective to remove the property from the Bankruptcy Court's custody and jurisdiction. Respondents, having no title, are mere trespassers.

Before Petitioner's plan was confirmed, Petitioner, a bankrupt, did not have funds independent of the Bankruptcy Court to pay or retain lawyers in the wrongful foreclosure actions. Petitioner was obliged to give his bankruptcy trustee a reasonable time to "fish or cut bait"

before Petitioner filed his application. That is, a trustee must be accorded a reasonable period of time for investigation, but there comes a time when he must "fish or cut bait." To permit a trustee to assert his title to an asset against the bankrupt, to do nothing to realize on it and yet forever prevent the bankrupt from doing so, would be wholly contrary to the policy of the bankruptcy law. *In re Ira Haupt & Co.*, 280 F. Supp. 336, 340 (S.D.N.Y. 1967), *aff'd*, 390 F.2d 251, 254 (2d Cir. 1968).

On May 22, 1981, Petitioner filed his application to employ counsel to pursue the wrongful foreclosure action against Respondents since the trustee would not "fish or cut bait." Bankruptcy Judge Gandy noted that the only "dilatory" action and "foot dragging" was by the Bankruptcy Court, not Petitioner, and any statute of limitations had been tolled.

Contrary to Bankruptcy Judge Gandy's ruling that any statutes of limitations were tolled, a subsequent Bankruptcy Judge applied the Texas statute of limitations to Petitioner. The effect of concluding that Respondents' violation of the stay was merely voidable and the corresponding application of the Texas four-year statute of limitations without regard to the legal delay attributable to and inherent in the administration of the bankruptcy laws is that Petitioner should have filed his application on or before May 3, 1981. Instead, Petitioner filed on May 22, 1981 — nineteen days too late under the Texas four-year statute of limitations.

There is no justification for a rule that would bar a meritorious action as untimely because of a trustee's delay, a congested court docket, and other circumstances over which Petitioner had absolutely no control. The time during which Petitioner was prevented from proceeding by the paramount authority of the Bankruptcy Court should not be counted against him in determining limitations, if any. *Wagner v. New York, Ontario and Western Railway*, 146 F.Supp. 926,

928-929 (M.D. Pa. 1956); *Doneghy v. Texas*, 334 S.W.2d 506, 509 (Tex. Civ. App. — Amarillo 1960). Equitable principles are designed to avoid disadvantage by legal delays attributable to the time-consuming procedures inherent in the administration of the bankruptcy laws. *Nicholas v. United States*, 384 U.S. 678, 683 (1966).

The law is or should be that no state statute of limitations can bar the filing of a complaint to preserve the integrity of the bankruptcy court's jurisdiction and property in its possession. Otherwise, the stay would not remain effective during the pendency of the case, but would expire without an order of the bankruptcy court upon the running of a state statute of limitations after a creditor violates the stay. Bankruptcy Rule 601 and its successor in the Bankruptcy Code do not provide for this. Specifically, Rule 601(b) provides for the "duration of the stay" to be that the stay shall continue until the case is dismissed or closed, or until the property subject to the lien is, with the approval of the court, set apart as exempt, abandoned, or transferred, or when the stay is lifted, terminated, annulled, or otherwise modified by the bankruptcy court. None of these events limiting the duration of the stay occurred in this case.

Simply, there is no statute of limitations to bar a complaint to protect property that remains in the jurisdiction of the bankruptcy court. Like the automatic stay, this is a logical corollary of the bankruptcy court's exclusive jurisdiction to deal with the property of the bankrupt within its custody from the date of the bankruptcy unless sooner modified by the court.

The drafters of the Constitution recognized the importance of establishing a uniform bankruptcy law throughout the United States and granted this power to Congress. U.S. Const. art. I, sec. 8, cl. 18. A system of bankruptcy under

federal statutes has a beneficent effect upon interstate commerce providing one uniform system of rights and remedies governing the relations of debtors and creditors in the event of business failure. 9 Am. Jur. 2d *Bankruptcy* secs. 3, 4, and 1287 (1963 — volume relating to Act). To permit inconsistent state statutes of limitations to control when property may come and go from the jurisdiction of the bankruptcy court is not consistent with the purpose of one uniform system of rights and remedies under a uniform system of bankruptcy law in the United States.

The Bankruptcy Act is paramount. States are without authority to make laws which deal with a phase of the subject of bankruptcies as covered by the Act. 9 Am. Jur. 2d *Bankruptcy* sec. 11 (1963 — volume relating to Act). The cases are legion holding that federal bankruptcy law is superior and paramount. *Eg., International Shoe Co. v. Pinkus,* 278 U.S. 261 (1929). Congress intended the bankruptcy court to have exclusive jurisdiction without providing a federal statute of limitations applicable to violations of the automatic stay during the pendency of a bankruptcy proceeding.

A phase of the statutes of limitations was covered by Act Section 11e. The issue here as to whether a violation of the automatic stay is void or merely voidable arose because of the Court of Appeals' misapplication of Section 11e.

First, Section 11e is phrased in terms of the *trustee's* ability to bring an action within the longer of two years from the date of adjudication or the expiration of a limitations period provided by nonbankruptcy law. The Court of Appeals misunderstood Petitioner's role. Petitioner was a debtor but *not* a debtor-in-possession or trustee, a trustee having been appointed. In a Chapter XI, a debtor is considered to be the trustee only when there is no trustee since the

debtor is then a debtor-in-possession. Section 11e is inapplicable to Petitioner since he was neither the trustee nor the debtor-in-possession.

Second, Section 11e only applies to actions which are based on transactions occurring prior to bankruptcy, i.e., pre-petition. An attempted wrongful foreclosure in violation of the stay by definition can only occur post-petition. 9 Am. Jur. 2d *Bankruptcy* sec. 1163, p. 865 (1963 — volume relating to Act). Petitioner's complaint was entirely new and original, i.e., not existing at the time of the filing of the petition in bankruptcy. It, like in *Burnham v. Todd,* 139 F.2d 338 (5th Cir. 1943), involved a summary proceeding to recover property wrongfully taken from the custody of the Bankruptcy Court post-petition since Respondents' foreclosure occurred post-petition.

Burnham v. Todd, 139 F.2d at 343, states:

> Since no federal limitation exists, the next question is whether a Texas statute of limitation applies. The possible question whether Congress intended Section 11 to supersede State limitation statutes except as it in its amended form recognizes them has not been raised.

In the instant case, Petitioner raised the issue as to whether Congress intended Section 11 to supersede state statutes of limitations. Petitioner says it does. Congress, by enacting a specific limitation period under Section 11e, covers the same subject matter as the Texas statutes of limitations. Since Section 11e does not provide a limitation period for declaring a post-petition foreclosure sale void *ab initio* for property in the custody of a bankruptcy court, no limitation period exists.

If the Court of Appeals is correct that a Texas statute of limitations period is applicable, then state law would interfere and conflict with the paramount power of the

bankruptcy courts over property in their jurisdiction. That is, a bankruptcy court could not enter orders in respect to property in its custody if a creditor violates the automatic stay and no action is taken within the time prescribed by a state statute of limitations. Such a result is inconsistent with the paramount federal power of the bankruptcy courts over property in its custody.

In *In re Hillcrest Lumber Co.*, 187 F. Supp. 304 (E.D.N.Y. 1959), the court refused to apply Section 11e to a bankruptcy proceeding by a debtor to direct a lien claimant to pay debtor certain sums, stating that the sums were subject to the continuing summary jurisdiction of the court. Also, in *Berman v. Provencher*, 614 F.2d 823, 825 (1st Cir. 1980), the court, *citing Burnham v. Todd*, 139 F.2d at 338, held that Section 11e does not bar a post-petition claim against the bankrupt for assets improperly concealed or misstated on the schedules.

The Bankruptcy Court and Respondents incorrectly relied on *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4 (1945) ("*Herget*"). *Herget* is distinguishable because it is a pre-petition preference action. The instant case is neither a preference action nor a pre-petition action. Rather, it is a post-petition action based on a creditor's post-petition foreclosure in violation of the automatic stay. In the District Court, Respondents' brief, on page 9, admits that *Herget* is based on a transaction "prior to bankruptcy" since "the operative facts of the preference occurred pre-petition." By definition, under Section 60(a)(1) of the Act, a "preference" is a transfer that occurred "within four months *before* the filing" of the bankruptcy petition. Thus, Petitioner correctly distinguishes *Herget* since *Herget* is a preference case based upon a transfer occurring prior to bankruptcy and Petitioner's complaint against Respondents is based upon Respondents' post-petition wrongful foreclosure.

In the District Court, Respondents also incorrectly attempted to discredit Petitioner's authorities by referring to Section 11d as being "superseded by Section 11(e)." Section 11d of the Act (formerly at 11 U.S.C.§29) appears as amended in 1938 in Section 11e. The provisions are comparable since the substance of the first sentence of the Section 11e subdivision was taken from the former Section 11d subdivision, and only the duration of the limitations was altered and the application clarified. 9 *Collier on Bankruptcy*, ¶ 11.12(2) (14th ed. 1977). Accordingly, Petitioner's authorities under Section 11d are precedential as to Section 11e and are consistent with this Court's decisions on the comparable part of the Bankruptcy Act of 1867, Section 2. *Dushane v. Beall*, 161 U.S. 513 (1896); *Hammond v. Whittredge*, 204 U.S. 538 (1907); *Yazoo & Miss. R.R. Co. v. Brewer*, 231 U.S. 245 (1913). Therefore, *Herget* is *in apropos*.

Hence, Section 11e is inapplicable, not only to a debtor but also to a trustee or a debtor-in-possession, as to post-petition actions of a creditor in violation of the automatic stay.

By applying Section 11e, the Court of Appeals was required to determine what state statute of limitations applies since the Court of Appeals determined that there was no applicable federal statute of limitations. If Respondents' violation of the automatic stay was void, then the ten-year Texas statute of limitations would apply since Respondents would be mere trespassers. On the other hand, if Respondents' violation of the automatic stay was merely voidable, then the four-year Texas statute of limitations would apply since Respondents acquired good title until invalidated.

Assuming, *arguendo*, if a Texas statute of limitations does apply, the correct Texas statute of limitations would be the

ten-year statute of limitations applicable to the recovery of property. Petitioner proceeded within ten years of the date of the improper foreclosure, so his action was not barred by the Texas four-year statute of limitations.

The Texas Supreme Court has held that despite the fact that a trustee's deed was regular on its face and apparently conferred good title on the purchaser, the plaintiff was allowed to go behind the deed and show the lack of authority to make the sale. And, it held that where there was a lack of authority to make the sale, the foreclosure sale and the deed were absolutely void because the trustee never had the power to convey the land. *Slaughter v. Qualls,* 162 S.W.2d at 675.

Respondents' trustee under the deed of trust was without authority to conduct a foreclosure sale since neither Respondents nor their trustee obtained the consent of the Bankruptcy Court to foreclose on the property in its jurisdiction. The Texas case, *Claude Regis Vargo Enterprises v. Bacarisse,* 578 S.W.2d 524 (Tex. Civ. App. — Houston [14th Dist.] 1979, writ ref'd n.r.e.), decided under Bankruptcy Rule 601, addressed the issue of whether a foreclosure sale under a deed of trust is void for lack of authority. The court held that under Rule 601 the sale was invalid, although there was a subsequent lifting of the stay which validated the sale. The Texas court of appeals cited the Advisory Committee's Note to Rule 601.

Nevertheless, the Court of Appeals decided that the Respondents' violation of the automatic stay was merely voidable and applied the four-year Texas statute of limitations, permitting the dismemberment of the estate by a unilateral act of Respondents without an order of the Bankruptcy Court lifting, terminating, annulling, or other-

wise modifying the stay. Heretofore, such a unilateral act by a creditor would have been treated far more seriously.

The foregoing demonstrates the serious implications of determining that Respondents' act in violation of the automatic stay was merely voidable, not void.

Accordingly, Petitioner respectfully suggests that the Court of Appeals opinion is in error, that an action in violation of the automatic stay is void, that no statute of limitations applies to deprive a bankruptcy court of the jurisdiction of property within its exclusive jurisdiction, and that Petitioner's complaint was not barred since no statute of limitations applied or, in the alternative, the ten-year statute of limitations had not expired in respect to the void act.

CONCLUSION

Because of the fundamental importance of the automatic stay to the administration of all bankruptcy estates, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals, that the judgment of the Court of Appeals be reversed and judgment rendered that Respondents' foreclosure in violation of the automatic stay was void, or, in the alternative, determine that violations of the automatic stay are void and remand with instructions consistent therewith, and for such other and further relief to which Petitioner is justly entitled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and the Appendix have been served upon Respondents, Theodore A. and Mary Paulissen, by depositing the copies in the United States mail with first-class postage prepaid, addressed to Respondents' counsel of record, Judith Elkin, Esq., Haynes and Boone, 3100 NCNB Plaza, 901 Main Street, Dallas, Texas 75202, on January 9, 1990.

All parties required to be served have been served.

C. Thomas Wesner, Jr.